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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DANIEL McDOW,

Plaintiff and Appellant,

v.

CITY OF SAN LUIS OBISPO,

Defendant and Respondent.

2d Civil No. B256987
(Super. Ct. No. 130381)
(San Luis Obispo County)

Daniel McDow was a police officer with the City of San Luis Obispo (City) until he was terminated for misconduct in connection with an off-duty trip to Mexico. He appeals the trial court's denial of his petition for writ of administrative mandate challenging his termination. (See Code Civ. Proc., § 1094.5.) We conclude substantial evidence supports the court's decision and that the City did not abuse its discretion in electing to terminate McDow. We affirm.

FACTS AND PROCEDURAL BACKGROUND

McDow was employed by the City's Police Department (Department) for approximately six years when he and a fellow officer, Armando Limon, took a road trip to Mexico. While there, McDow discovered that Limon had his off-duty handgun. Concerned about traveling with a weapon, McDow and Limon decided to return home rather than stay overnight. Before leaving, they stopped at a pharmacy where Limon purchased diet pills and Ritalin. McDow bought diet pills and Soma.

Upon reaching the border crossing, McDow, who was driving, told a customs and border protection (CBP) officer they had nothing to declare. Because the vehicle was registered to someone else, McDow and Limon were directed to a secondary inspection area. During this inspection, a CBP officer discovered a bag of assorted pharmaceutical tablets in a backpack in the vehicle's trunk. When asked why he did not initially declare those medications, McDow said he thought he needed only to declare agricultural products and alcohol. He claimed the pharmacist who sold them the drugs said there would be no issue in taking them across the border.

Following a pat-down search, officers seized from McDow's front pocket a plastic bottle containing unidentified pills. Limon stated that most of the seized pharmaceuticals were his. McDow claimed ownership of 165 green tablets that were later identified as diethylpropion HCl (Tenuate), a schedule IV diet drug, and 34 white tablets identified as methylphenidate HCl (Ritalin), a schedule II drug. He also claimed 15 unidentified blue tablets and later testified that he was in possession of Soma (carisoprodol) when he came across the border. McDow did not have a valid prescription for any of these drugs even though he was aware, from prior experience, that Soma requires a prescription.

During an interview with United States Immigration and Customs Enforcement (ICE) agents early the next morning, McDow stated, "I'm an idiot. I should have been better informed." The agents allowed McDow to call his girlfriend, Holly Hovore. McDow told Hovore he was in a bad situation and said, "Guess I will go to jail and from there I don't know, all comes down from there." The ICE agents heard McDow ask her to call in sick for him as he was scheduled to report to work later that morning.

Upon their release from custody, Limon and McDow returned home and were placed immediately on administrative leave by the Department. Pursuant to an agreement with the United States Attorney, McDow pled guilty to the charge of introducing and delivering into interstate commerce drugs that were misbranded, in violation of title 21 United States Code sections 331(a) and 333(a)(1). He admitted that at the time he sought entry into the United States, he was in possession of a schedule II

controlled substance (methylphenidate) and a schedule IV controlled substance (diethylpropion) without a prescription for those drugs.

The Department subsequently investigated McDow for misconduct. Following an administrative inquiry and *Skelly*¹ hearing, McDow was terminated for violating (1) rule IV.LL,² conduct detrimental to the Department; (2) rule IV.KK.5, neglect of duty for failing to report information regarding criminal activity by a Department employee; (3) rule IV.Y, absence from duty; (4) rule VII.C.1., conviction of a felony or misdemeanor under California law; (5) rule VII.C.6, unauthorized or inexcusable absence without leave or unauthorized use of sick leave; (6) rule VII.C.10., violation of a Department policy, directive or rule or regulation; and (7) San Luis Obispo Municipal Code section 2.36.380 A., prohibition against "conduct which would tend to discredit or dishonor his/her position with the city."

McDow filed an administrative appeal, which was heard by James Merrill (Hearing Officer). The issue was whether the Department had just cause to terminate McDow and, if not, whether another remedy should be imposed. Following a four-day evidentiary hearing, the Hearing Officer determined the federal plea agreement, in which McDow admitted the pharmaceuticals were misbranded, "d[id] not consist of a charge or admission that [he] had knowledge that the drugs in his possession required a prescription and that it was illegal to transport them without a prescription." Finding insufficient evidence to support the Department's contention that McDow knew he was transporting prescription drugs across the border, the Hearing Officer concluded it had failed to prove the fourth charge of conviction of a felony or misdemeanor under California law and also the second charge of failing to report criminal activity by a Department employee. The Hearing Officer did, however, find sufficient evidence to support the charges of conduct detrimental to the Department, absence from duty, unauthorized or inexcusable absence, violation of Department rules and regulations and conduct that discredits or dishonors the City. He explained: "The conviction of a misdemeanor is sufficient evidence that

¹ *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).

² All rule references are to the Department's Rules and Regulations.

[McDow's] actions consisted of conduct which is detrimental to the Department. Police Officers are responsible to uphold the laws of the United States and not violate them. In addition the actions of [McDow] were in fact the subject [of] public information which reflected negatively on the image of the Police Department."

The Hearing Officer acknowledged that the charges, particularly the first and seventh ones, were serious, but found that "in balance, the offense is mitigated based on the lack of evidence that [McDow] knew he purchased [a] prescription drug and the City considered that allegation as a key element in deciding to terminate [him]." The Hearing Officer recommended that McDow be reinstated as a police officer under a two-year last chance agreement, in which any future rule violation during that period would result in immediate termination.

After reviewing the Hearing Officer's findings and recommendation, the City Council agreed the evidence did not support by a preponderance of the evidence the charges that McDow was convicted of a felony or misdemeanor under California law and was required to report criminal activity. Nonetheless, it found the evidence supported the other charges and observed that "McDow knew, or reasonably should have known, based upon his knowledge and experience as a Police Officer, that it is illegal to bring into the [United States], foreign-made drugs without a valid prescription in your own name from a U.S. doctor" and without declaring them to United States Customs. It determined this conduct constituted "serious misconduct" that was detrimental to the Department and the City.

The City Council rejected the Hearing Officer's recommendation to conditionally reinstate McDow. In sustaining his termination, it noted that "police officers are critically important to the community and their work is entitled to the highest respect from citizens. Part of that foundation of trust, though, must be premised on the assumption that they will not violate the law."

The trial court denied McDow's petition for writ of administrative mandate, finding that although he may not have had the specific criminal intent to bring foreign drugs over the border without a valid prescription, his "conviction of a federal

misdeemeanor and his decision to abuse the sick leave policy support his termination, as well as his conduct in purchasing pharmaceuticals (including Soma) in Mexico with the intention to cross the border without a prescription and without declaring same. Such misconduct is detrimental to the Department's credibility and causes concern that McDow may not use good judgment in the future." The court also found that the City did not abuse its discretion by choosing termination rather than a lesser penalty. McDow appeals.

DISCUSSION

Standard of Review

It is undisputed that McDow's discharge from employment affected a "fundamental vested right." (*McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 129.) The trial court therefore must exercise its independent judgment to determine whether due process requirements were met and whether the agency's findings are supported by the weight of the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 16; *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 51.) We must sustain the trial court's factual findings if substantial evidence supports them, resolving all conflicts in favor of the prevailing party and giving that party the benefit of every reasonable inference in support of the judgment. (*Kazensky*, at p. 52; *LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 940.)

"Judicial review of an agency's assessment of a penalty is limited, and the agency's determination will not be disturbed in mandamus proceedings unless there is an arbitrary, capricious or patently abusive exercise of discretion by the agency. [Citation.] . . . If reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred. [Citation.] An appellate court conducts a de novo review of the trial court's determination of the penalty assessed, giving no deference to the trial court's determination. [Citation.]" (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279 (*Flippin*).)

Substantial Evidence Supports the Trial Court's Findings

Due process requires notice and an opportunity to respond to charges of misconduct against a permanent civil service employee. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275-1276.) Under *Skelly*, *supra*, 15 Cal.3d at page 215, the minimum procedural due process protections required before disciplinary action include "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

McDow contends he was denied procedural due process because the City Council and the trial court made findings of misconduct that were not charged in the notice of intent to terminate. The City responds that McDow had adequate and repeated opportunities to respond to the charges against him, that he took advantage of those opportunities and that at no point did he misunderstand the charges against him. It also contends the evidence supports the trial court's findings. We agree with the City.

The notice of intent to terminate McDow set forth seven charges, two of which involved conduct unbecoming an officer. The Department provided him with substantial documentation regarding his conduct in connection with the border detention, including a 34-page administrative inquiry report prepared by the investigating officer, a memorandum with recommendations prepared by Captains Ian Parkinson and Chris Staley, copies of the rules and ordinances McDow allegedly violated, copies of the federal criminal investigation report and plea documents and copies of recordings of investigative interviews. After acknowledging receipt of these documents, McDow and his counsel participated in a *Skelly* hearing. McDow then participated in a four-day administrative hearing in which two of the seven charges were deemed unsupported. The administrative record was independently reviewed by both the City Council and the trial court.

McDow maintains he was terminated for *knowingly* purchasing and transporting prescription medication although he was never charged with such an offense. Although he is correct that the federal crime to which he pled guilty is a strict liability

offense, he was not terminated for having the specific criminal intent of bringing foreign-made drugs across the border without a valid prescription. Those charges were deemed unfounded. He was terminated for conduct detrimental to the Department, absence from duty, unauthorized use of sick leave, violation of a Department policy, rule or other directive, and engaging in conduct "tend[ing] to discredit or dishonor his[] position with the city." The trial court upheld these specific findings.

The events of the CBP/ICE border detention are largely undisputed. Federal agents discovered on McDow's person a bottle containing two different federally scheduled pharmaceuticals purchased in Mexico. McDow later admitted to purchasing Soma, another prescription medication, without declaring it to United States Customs. When McDow was asked during the evidentiary hearing whether he "knew, at the time [he was] at the border, that Soma required a prescription," he responded, "Yes." He explained that a doctor had previously prescribed Soma for a back injury.

It can be reasonably inferred from McDow's own testimony that he knew, at least with regard to Soma, that he was bringing into the United States a prescription drug for which he had no valid prescription. He may not have understood this was a federal crime or that the drug needed to be declared to United States Customs, but as the trial court points out, he very quickly understood the ramifications of his actions. He admitted to agents he was an "idiot" and should have "been better informed." He further understood he was in deep trouble, telling his girlfriend that he may go to jail. He also conceded that a conviction for a federal misdemeanor was "not a positive thing" for a police officer, and that his actions "soil[ed]" his fellow officers and negatively impacted the Department's integrity. This evidence supports the findings of conduct detrimental to the Department and tending to discredit or dishonor McDow's position. (See rule IV.LL; San Luis Obispo Mun. Code, § 2.36.380 A.)

Peace officers are held to high standards of conduct. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 571-572; *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1302.) An officer's position is one of "trust and the public has a right to the highest standard of behavior from

those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties." (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 231; see *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1060-1061 [because "officers must rely on each other during life-threatening situations, they must possess personal qualities conducive to building trust and cooperation"]; *Ackerman v. State Personnel Bd.* (1983) 145 Cal.App.3d 395, 398-399 [police officer "must be held to a higher standard than other employees"].)

In *Barr v. City of San Diego* (1960) 182 Cal.App.2d 776, a police officer was charged with, and then acquitted of, possession of marijuana. The court determined his acquittal did not necessarily mean he was fit for office. (*Id.* at p. 781.) It explained that the purpose of the criminal proceeding was to assess whether he should be punished for a crime. In contrast, the agency's decision as to whether he should be terminated related to "... the maintenance of the morale and efficiency of the police force and its good reputation in the community. . . ." (*Ibid.*) That the officer was acquitted "does not prevent the council from finding such misconduct on his part as in its judgment disqualifies him for the office which he holds." (*Ibid.*)

Here, McDow was not acquitted. He pled guilty to a federal misdemeanor and was sentenced accordingly. Moreover, he failed to report to work as scheduled and, rather than notify the Department of his border detention, he asked his girlfriend to call in and say he was sick. Although he denies saying this, ICE Agent Sonia Tapia testified that she was present when he made the telephone call and heard him say to "tell them he wasn't going to be in today, that he was going to be sick." The trial court found the rule violation was supported not only by the agent's testimony,³ but also by "the Department's communications technician who recalls receiving a call from [the girlfriend] that McDow

³ The trial court overruled McDow's hearsay objection to Agent Tapia's testimony "because it is not hearsay (because not offered for the truth of the statement) or because [it] is a party admission." McDow has not demonstrated this was error. Evidence Code section 1220 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party" (See *People v. Dennis* (1998) 17 Cal.4th 468, 528 ["hearsay rule does not prevent evidence of a statement made by a party from being admitted against that party"].)

was sick." This evidence was sufficient to establish that McDow was guilty of absence from duty, abusing the sick leave policy and violating Department rules and regulations (see rules IV.Y, VII.C.6, VII.C.10), in addition to the two more serious violations involving conduct unbecoming an officer. (See rule IV.LL; San Luis Obispo Mun. Code, § 2.36.380 A.)

No Abuse of Discretion in Imposing Termination

McDow contends that even if he did violate Department rules and regulations, the City Council abused its discretion by terminating his employment instead of imposing a lesser penalty. He claims the penalty was excessive given his positive performance evaluations and lack of prior disciplinary issues. We disagree.

"Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed. [Citations.]" (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580; *Flippin, supra*, 148 Cal.App.4th at p. 279.) Although the Hearing Officer recommended reinstatement with a last chance agreement, the City Council was not persuaded, citing "its concern that law enforcement officers must maintain high levels of integrity in order to maintain credibility." It "believed that any punishment less than termination would be inappropriate considering the seriousness of McDow's conviction of a federal crime."

Where reasonable minds could differ with regard to the propriety of the disciplinary action, the penalty must be upheld. (*Flippin, supra*, 148 Cal.App.4th at p. 279; *County of Los Angeles v. Civil Service Com.* (1995) 39 Cal.App.4th 620, 634.) Regardless of McDow's intent in bringing the prescription drugs across the border, he failed to report for duty as scheduled, called in sick when he was not sick, brought prescription drugs into the country without declaring them, aided and abetted Limon in doing the same and was convicted of a federal misdemeanor. Under these circumstances,

we cannot conclude his termination constituted an abuse of discretion. The trial court did not err by denying the petition for writ of mandate.

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

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